

STATE OF MICHIGAN
IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees/Cross-Appellants

Supreme Court No. 129134

Court of Appeals Case No. 251110

vs.

Lower Court No. 01-007289-NH

MEMORIAL HOSPITAL, D/B/A MEMORIAL
HEALTHCARE CENTER,

Defendant,

and

RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O.,
JAMES H. DEERING, D.O., P.C., AND SHIAWASSEE
RADIOLOGY CONSULTANTS, P.C.,

Defendants-Appellants/Cross-Appellees.

**AMICUS CURIAE BRIEF OF
MICHIGAN STATE MEDICAL SOCIETY
IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

KERR, RUSSELL AND WEBER, PLC

By: JOANNE GEHA SWANSON (P33594)
DANIEL J. SCHULTE (P46929)
MICHAEL A. SNEYD (P52073)

Attorneys for Amicus Curiae,
Michigan State Medical Society
500 Woodward Avenue, Suite 2500
Detroit, MI 48226
313.961.0200

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STATEMENT OF QUESTION PRESENTED

Should this Court deny the Application for Leave to Appeal, through which Defendants seek to make the *Apsey* ruling retroactive so as to potentially invalidate hundreds of affidavits of merit and meritorious defense, requiring the dismissal of the concomitant claims on statute of limitations grounds?

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae the Michigan State Medical Society (“MSMS”) is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to act as *amicus* with respect to legal issues of significance to the medical profession.

This case involves an affidavit of merit submitted in support of an action for medical malpractice. Defendants asserted that the out-of-state affidavit of merit should not be considered because it failed to comply with the notary certification requirement contained in MCL 600.2102. Plaintiffs argued that the affidavit was proper because it complied with the Uniform Recognition of Acknowledgments Act (“URAA”), MCL 565.261, in that it was properly signed and notarized. The Trial Court agreed with Defendants, concluding that the failure to provide the special certification required by MCL 600.2102 was fatal to the notarization. The affidavit was thus deemed a “nullity,” which resulted in the dismissal of Plaintiffs’ case.

The Court of Appeals initially affirmed in a unanimous decision rendered on April 19, 2005, holding that the requirements of MCL 600.2102 controlled and any affidavit submitted in violation of that statute was invalid (“Aspey decision”). The Court of Appeals further held that Plaintiffs could not cure the defect by submitting a belated certification of the notarization.

MSMS joined Plaintiffs and numerous other interested organizations in urging the Court of Appeals to reconsider the Aspey decision because of the invalidating effect the retroactive application of the decision would have on countless numbers of affidavits of merit and meritorious defense. On June 2, 2005, the Court of Appeals issued an order granting the motion for reconsideration and vacating the *Aspey* decision. Subsequently, on June 9, 2005, the Court of

Appeals issued a two-person majority decision in *Apsey* (“*Apsey II*”), essentially adopting the analysis of its earlier decision but, in the interest of fairness and equity, allowing time for the *Apsey* Plaintiffs and for all parties in pending cases to cure the defect by submitting the requisite notary certification. The Court explained:

In light of the apparent reliance on the URAA by the legal community, we believe the [sic] justice requires a prospective application. See *Gladych, supra* at 606. Retroactive application would result in the dismissal of a large number of otherwise meritorious medical malpractice claims. Our Supreme Court has recognized that “resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy.” *Riley v C & H Indus*, 431 Mich 632, 644-645; 433 NW2d 787 (1988). Fairness and public policy both support a prospective application because a serious injustice could result from a retroactive application, and prospective application of the ramifications for the failure to provide the MCL 600.2102(d) certification accomplishes a “maximum of justice” under the presented circumstances. *Lindsey, supra* at 69.

Slip Op. at 8. The Court thus permitted the certification submitted by the *Apsey* Plaintiffs in the summary disposition proceedings to serve as “proper certification.” With regard to other pending medical malpractice cases where plaintiffs had not complied with MCL 600.2102(4), in the interest of “justice and equity,” the Court allowed those plaintiffs to “come into compliance” by “filing the proper certification.” *Id.* at 9. However, strict application was to be required from the date of the opinion. The Court explained:

From the date of the issuance of this opinion, any affidavit of merit acknowledged by an out of state notary filed without the proper certification will not toll the statute of limitations because the legal community is now on notice.

Id. at 9.

The *Apsey* Defendants now seek leave to appeal the application of the *Apsey II* decision, arguing that the ruling should be applied to all cases without time allowed for cure, or alternatively, to the *Apsey* case itself. MSMS believes that fairness opposes the *Apsey* Defendants’ position and urges this Court to deny leave.

ARGUMENT

I. THE PROSPECTIVE EFFECT GIVEN TO THE *APSEY II* DECISION WITH RESPECT TO PENDING MEDICAL MALPRACTICE CASES IS WARRANTED BY FAIRNESS AND PUBLIC POLICY CONSIDERATIONS AND THUS, DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL SHOULD BE DENIED.

In its *Apsey II* decision, the Court of Appeals was presented with two different Michigan statutes governing the proper validation of affidavits. The first-enacted statute, MCL 600.2102, requires that an out-of-state affidavit be certified by the clerk of the local court in the county in which the affidavit was notarized. The later-enacted statute, MCL 565.261 (part of the Uniform Recognition of Acknowledgments Act, ("URAA")), explicitly authorizes use of properly notarized but uncertified out-of-state affidavits. There is no dispute that the affidavit at issue in the *Apsey* case was proper under the URAA, but did not comply with MCL 600.2102. The only issue before the Court was whether the requirements of MCL 600.2102 apply to exclude an affidavit that is otherwise proper under the URAA.

In resolving the issue, the majority held that that an affidavit which is to be submitted to a court must comply with MCL 600.2102. The Court explained:

[W]e find that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 565.262 of the URAA. ... In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered, by the judiciary. This special certification requirement of MCL 600.2102 is not diminished or invalidated by the subsequently enacted URAA. See MCL 565.268. Instead, MCL 565.268 allows for the statutes to be harmonized. As such, the special certification is a necessary part of an affidavit submitted to the court to meet the requirements of MCL 600.2912d(1).

Slip Op. at 5.

The Court then considered whether "the ramifications ... of its decision" should be applied retroactively or prospectively. In finding that the issue it had addressed was one of "first impression"

whose resolution “was not clearly foreshadowed,” the Court noted that there has been “confusion in the legal community as to whether the more relaxed standards of the URAA applied.” *Id.* at 8. The Court explained:

Our decision is based on a law, MCL 600.2102, requiring a special certification for out of state notarial acts, which has either been overlooked by practitioners in medical malpractice cases, or, more likely, practitioners have been under the impression that the URAA, enacted subsequent to MCL 600.2102, was the applicable statute and that special certification was not required.

Id. at 7. The Court also noted the impact the retroactive application of its decision would have on pending cases, stating:

Plaintiffs’ counsel raised a concern at oral argument with regard to the significant impact this holding could have on medical malpractice cases in Michigan because of the fact that a majority of affidavits of merit for medical malpractice cases come from out of state and that practitioners have relied on the URAA validation requirements for the out of state notarial acts. Amici Curiae have also raised concerns regarding practitioner’s beliefs that the less restrictive URAA requirements for verification of notarial acts was sufficient verification, and the significant impact this would have on medical malpractice claims, which in large part are supported by affidavits of merit from out of state doctors. . . Retroactive application would result in the dismissal of a large number of otherwise meritorious medical malpractice claims.

Id. at 7-8.

To resolve the conundrum, the Court of Appeals observed that “[o]ur Supreme Court has recognized that ‘resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy,’” citing *Riley v C & H Indus*, 431 Mich 632, 644-645; 433 NW2d 787 (1988). Both considerations, the Court of Appeals held, supported prospective application here. Parties in pending cases could come into compliance by filing the proper certification. From the date of the opinion, any affidavit of merit acknowledged by an out of state notary had to be properly certified in order to toll the statute of limitations.

The Court of Appeals’ decision on the retroactivity issue should not be disturbed. While MSMS is only infrequently aligned with plaintiffs in medical malpractice matters, MSMS is

interested in maintaining fairness to all litigants in this state. The *Apsey* application that Defendants seek could effectively invalidate hundreds of affidavits of merit. Because a valid affidavit of merit must be filed with a complaint in order to commence the action and toll the statute of limitations, giving the *Apsey* decision immediate, incurable effect could result in the dismissal of hundreds of pending claims, the re-filing of which would now be barred by the statute of limitations. Affidavits of meritorious defense submitted on behalf of physicians could likewise be deemed invalid.

The Court of Appeals appropriately resolved the conundrum created by the *Apsey* decision by enabling the *Apsey* Plaintiffs and other parties in pending cases to submit the requisite notary certifications. Because Defendants' Application for Leave to Appeal seeks to alter the effect of the *Apsey II* decision, leave should not be granted.

CONCLUSION AND RELIEF REQUESTED

Amicus *Curiae* Michigan State Medical Society therefore respectfully requests that this Honorable Court deny the Application for Leave to Appeal.

KERR, RUSSELL AND WEBER, PLC

By: 

JOANNE GEHA SWANSON (P33594)

DANIEL J. SCHULTE (P46929)

MICHAEL A. SNEYD (P52073)

Attorneys for Amicus Curiae,

Michigan State Medical Society

500 Woodward Avenue, Suite 2500

Detroit, MI 48226

313.961.0200

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